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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MANUEL FLORES-MONTANO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is not reported. *United States' Pet. for a Writ of Cert.* ("Pet.") App. at 1a. The district court's opinion is also not reported. *Id.* at 2a-3a.

JURISDICTION

On March 14, 2003, the Ninth Circuit entered its judgment. Pet. App. at 1a. The government has invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). Pet. at 1.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT OF THE CASE

A. Facts

1. The Search of Respondent's Vehicle Was Not Routine: a Contract Mechanic Completely Dismantled the Vehicle's Fuel System.

On February 12, 2002, at 4:20 p.m., Respondent attempted to enter the United States at the Otay Mesa Port of Entry in Southern California as the driver of a 1987 Ford Taurus station wagon. Pet. App. at 7a. Customs Inspector Visente Garcia asked Respondent several "routine border inspection questions," which Respondent answered. *Id.* at 4a. Respondent avoided eye contact. *Id.* When Respondent handed Inspector Garcia his permanent resident alien card and his driver's license, Respondent's hand was shaking. *Id.*

Inspector Garcia tapped on the gas tank with his screwdriver. Pet. App. at 4a. He "noticed that the fuel tank sounded solid." *Id.* In addition, a narcotics detector dog alerted to the vehicle. *Id.* at 4a, 7a. Respondent was ordered out of the vehicle and taken to the security office. *Id.* at 4a. Customs inspectors drove the car to the secondary inspection area for a thorough inspection. *Id.*

In secondary inspection, Senior Customs Border Inspector Jovito Pesayco also tapped the gas tank and "it sounded solid" to him. Pet. App. 7a. He was informed of the narcotic detector dog's alert and he called a contract mechanic to come to the port of entry to disassemble the vehicle's fuel

system. *Id.* at 4a, 7a. After approximately 20 to 30 minutes, the mechanic arrived. *Id.* Senior Inspector Pesayco took the car to a hydraulic lift where the mechanic elevated it. *Id.*

Senior Inspector Pesayco observed the disassembly and noted that it was performed in a manner similar to that detailed in *United States v. Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002). *See* Pet. App. at 8a-9a. In *Molina-Tarazon*,

> [t]he mechanic hoisted the [vehicle] onto a lift, loosened the straps holding the tank to the chassis, disconnected the filler and the sending hoses, detached electrical connections, disengaged the fill neck and unscrewed the bolts. He then detached the tank itself by unscrewing the pump unit and removing the "bushing" which held the tank to the [vehicle]. All of those actions required the use of force. . . .

Molina-Tarazon, 279 F.3d at 714. Senior Inspector Pesayco further described the mechanic as "us[ing] force and tools." Pet. App. at 7a. It took approximately ten to fifteen minutes for the mechanic successfully to lower the gas tank on a second, portable lift. *Id.* at 8a. The mechanic did not reassemble the vehicle. *See id.*

After the contract mechanic lowered the tank, Senior Inspector Pesayco noticed bondo on top of it. Pet. App. at 8a. In five to ten minutes, he hammered off the bondo, revealing an access plate underneath. *Id.* The inspector's hammering scratched and "possibly slightly dented" the tank. *Id.* He opened the access plate and found approximately 37 kilograms of cellophane-wrapped packages containing marijuana. *Id.*

2. The Declarations Submitted by the Government Below Did Not Establish That the Search Conducted Here Was Reasonable.

In an effort to demonstrate that the authority randomly to disassemble vehicles at the border is "essential" to border

security, the government submitted several declarations to the district court. Jayson P. Ahern, Director, Field Operations, for the Southern District of California Customs Management Center,[1] reports that close to 25% of all drug seizures at the Southern California ports of entry have been gas tank seizures. Pet. App. 11a-12a. Although Director Ahern states that "searches" of gas tanks are "routine," *id.* at 12a, he does not claim that disassembly of fuel systems is "routine." *See id.* Similarly, although he believes it is "very important that Customs continues to have the ability to conduct random and suspicionless searches for drugs in gas tanks and other compartments of vehicles at the border," *id.*, he does not claim that Customs conducts "random and suspicionless" disassemblies of gas tanks. He does not address the numerous other investigative techniques that inspectors may randomly perform that do not require vehicle disassembly. *See infra* at 40-41; *see also* U.S. Customs Service, *America's Frontline: Performance and Annual Report Fiscal Year 2002* 17-18, 30, 32, 34-35 (emphasizing non-intrusive inspection techniques) ("*Customs' Annual Report*").

Director Ahern speculates that "[r]equiring reasonable suspicion for compartment searches involving necessary damaging force would result in an increase in compartment smuggling of drugs, contraband, and other dangerous materials." Pet. App. at 13a. He does not support his *ipse dixit* with any statistics or other evidence, even though federal courts in other border districts have ruled that such searches are nonroutine searches requiring reasonable suspicion for many years. *See, e.g.*, *United States v. Rivas*, 157 F.3d 364, 368 (5th Cir. 1998); *United States v. Carreon*, 872 F.2d 1436, 1440-42 (10th Cir. 1989).

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[1] The declarations were filed before the creation of the Department of Homeland Security.

The Declaration of Diane Hinckley, Assistant Director for Inspections, Immigration and Naturalization Service ("INS"), San Diego District, reports that gas tanks are used for smuggling undocumented aliens into the United States, and that the use of such smuggling techniques is "not uncommon." Pet. App. 15a-16a. Like Director Ahern, she claims that "inspectors often search gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles." *Id.* at 16a. But, also like Director Ahern, she makes no claim that inspectors routinely dismantle gas tanks—without suspicion—as part of these efforts. *See id.* at 15a-18a.

Nor does she claim that the "search[es] of gas tank areas" that inspectors "often" perform are gas tank disassemblies. *See* Pet. App. at 16a. Given that Customs contracts with mechanics to perform fuel system disassemblies, Pet. at 15, the searches to which Assistant Director Hinckley refers—the ones that she advises are conducted by inspectors—are unlikely to involve gas tank disassembly.

Indeed, when a gas tank is employed in alien smuggling, as opposed to drug smuggling, the gas tank cannot serve its function: while marijuana like that found in Respondent's case may be wrapped in cellophane and allowed to float in the fuel, people cannot be concealed in an operating gas tank. As Assistant Director Hinckley notes, vehicles used for this purpose must be modified:

> As part of the vehicle's modification, gasoline is sometimes siphoned into the motor from a plastic bottle in the engine or from a specially built small tank in the trunk. . . .

Pet. App. at 16a-17a. Inspectors need not disassemble a vehicle's fuel system to discover "a plastic bottle in the engine" from which fuel is siphoned or "a specially built small tank in the trunk." In fact, Assistant Director Hinckley does not claim that the sort of disassembly undertaken in

Respondent's case, as opposed to the sort of inspections conducted by border inspectors, has ever resulted in the discovery of people being smuggled in a gas tank. *See id.* at 15a-18a.

Assistant Director Hinckley also offered her opinion—unsupported by any statistics—that "[r]equiring reasonable suspicion to search gas tank compartment areas and other compartments could lead to gas tank compartments and other compartments becoming the preferred choice for alien smuggling in the Southern District of California." Pet. App. at 16a-17a. Not only does Assistant Director Hinckley not specify that she is referring to the sort of gas tank disassembly undertaken in the instant case, she offers no evidence that these smuggling techniques have "becom[e] the preferred choice for alien smuggling" in those districts that have recognized a reasonable suspicion requirement for nonroutine searches of inanimate objects for several years. *See id.* at 15a-18a.

B. Proceedings Below

On February 27, 2002, the grand jury for the Southern District of California indicted Respondent on two counts, charging importation of approximately 37 kilograms of marijuana in violation of 21 U.S.C. §§ 952 and 960 and possession of the same with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

On June 7, 2002, Respondent filed a motion to suppress the fruits of the nonroutine border search of the vehicle. On June 20, 2002, the district court entered an order suppressing the evidence. *See* Pet. App. at 2a-3a. Relying upon *Molina-Tarazon*, the district court held that the search of the fuel tank was a nonroutine search requiring reasonable suspicion and that the government had both declined to establish reasonable suspicion and "waived its right to rely on the alternative basis of reasonable suspicion." Pet. App. at 3a. The Solicitor

General agrees that the government did not rely on reasonable suspicion as a basis for denial of the motion. Brief for the United States ("B.U.S.") at 4.

On June 20, 2002, the government filed a Notice of Appeal to the Ninth Circuit Court of Appeals. On July 26, 2002, it petitioned that court to convene an en banc panel to reconsider *Molina-Tarazon*. On March 14, 2003, the Court of Appeals issued a summary affirmance of the district court's judgment. Pet. App. at 1a.

SUMMARY OF ARGUMENT

The Solicitor General argues that any person who returns to the United States in a vehicle risks disassembly of that vehicle at the unfettered discretion of a low-level Customs or Immigration inspector. Disassembly of a motor vehicle for no reason whatsoever, even at the border, is not "reasonable" under the Fourth Amendment.

In *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985), the Court held that the detention of a traveler at the border "beyond the scope of a routine customs search and inspection," must be supported by reasonable suspicion. Subsequent to *Montoya de Hernandez*'s reaffirmation that routine border searches are reasonable under the Fourth Amendment, every Circuit that has addressed the "nonroutine border search doctrine" in the context of searches of property has held that certain especially intrusive searches of inanimate objects are nonroutine, and that such searches must be supported by reasonable suspicion. In *Molina-Tarazon*, the Ninth Circuit Court of Appeals adopted this long-held, unanimous view.

The Solicitor General now argues that the several Courts of Appeals have erred in finding that some highly intrusive searches of personal property at the border are not routine and therefore are unreasonable under the Fourth Amendment

unless supported by reasonable suspicion. While it is true that the government has wide powers of search and seizure at the border, those powers are not unlimited and are subject to the Fourth Amendment's requirement of reasonableness. The Court's cases have never extended the border search exception to searches and seizures such as that conducted here, which involves the disassembly of a vehicle's fuel system rather than a search of a closed container.

The Solicitor General argues that because revenue inspectors were allowed to search ships at the time of the framing, history somehow supports his view that low-level government officials enjoy the authority to undertake disassemblies of modern-day conveyances without any reasonable suspicion. He provides no authority, however, for the proposition that these revenue inspectors had the power to disassemble the vessels they inspected. Nor does he cite any historical materials indicating that searches and seizures of conveyances involving forcible disassembly were considered reasonable at the time the Fourth Amendment was adopted. Rather, the historical record indicates that highly intrusive searches of vessels were considered unreasonable.

Moreover, balancing a traveler's privacy and property interests against the government's interest in conducting suspicionless disassemblies of vehicles strongly favors the traveler. First, travelers enjoy substantial privacy and property interests in their vehicles that are compromised when government officials and their employees disassemble their vehicles. Indeed, the Courts of Appeals have unanimously recognized those interests in finding that highly intrusive vehicle searches at the border must be supported by reasonable suspicion. Second, as recognized in *Molina-Tarazon*, disassembly of the fuel system of a motor vehicle involves the risk of harm and serves to diminish the operator's sense of security in the vehicle.

The Solicitor General argues that the ability to undertake suspicionless disassemblies of vehicles is "essential to maintaining border security," B.U.S. at 10, and warns of "unacceptable adverse consequences to border security." *Id.* at 30. The Solicitor General's claims are not supported by the record. First, he does not dispute Respondent's argument that the government has not demonstrated that Customs or Immigration inspectors regularly conduct the suspicionless gas tank disassemblies which are supposedly "essential to maintaining border security." There is no evidence that the day-to-day practices of these agencies have been disturbed by the modest requirement of reasonable suspicion recognized in the Courts of Appeals.

Second, none of the evidence offered below demonstrates that the mission of the various border inspectors has in any way been compromised in those Circuits that applied the nonroutine search doctrine to inanimate objects prior to the Ninth Circuit's decision in *Molina-Tarazon*. In fact, the applicability of the nonroutine border search doctrine to personal property was recognized at least 15 years ago in the Tenth Circuit, and at least 5 years ago in the Fifth Circuit. Although these two Circuits contain ports of entry that are as busy as those in Southern California, the government offered no evidence at all of negative consequences in those Circuits. Third, the Solicitor General ignores the fact that border inspectors already conduct highly effective vehicle inspections that do not require vehicle disassembly.

ARGUMENT

A. Routine Searches Performed at the Border Require No Level of Suspicion, but the Nonroutine Search and Seizure Here—the Disassembly of a Vehicle's Fuel System—Must Be Supported By Reasonable Suspicion.

The Court has held that "*[r]outine* searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant. . . ." *Montoya de Hernandez*, 473 U.S. at 538 (emphasis added) (footnote omitted). Similarly, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court observed that the power to exclude aliens may "be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders." *Id.* at 272 (citing *Carroll v. United States*, 267 U.S. 132, 149 (1925) and *Boyd v. United States*, 116 U.S. 616 (1886)). *United States v. Ramsey*, 431 U.S. 606 (1977), characterizes the border search doctrine similarly: "it was 'without doubt' that the power to exclude aliens 'can be effectuated by *routine* inspections and searches of individuals or conveyances seeking to cross our borders.'" *Id.* at 619 (emphasis added) (citation omitted).

Thus, the Court has consistently described the authority to conduct suspicionless border searches as an incident to a "routine" border inspection. In *Montoya de Hernandez*, the Court explicitly found that the detention in that case was not routine and required reasonable suspicion. 473 U.S. at 541; *accord Molina-Tarazon*, 279 F.3d at 712 ("In order to conduct a search that goes beyond the routine, an inspector must have reasonable suspicion that the person to be searched may be carrying contraband.").[2] The reasonable suspicion

[2] "[T]he distinction between 'routine' and 'nonroutine' turns on the level of intrusiveness of the search," *Molina-Tarazon*, 279 F.3d at 713, rather than its frequency. Thus, the government's claim below that disassembly of fuel systems is "not . . . infrequent," Pet. App. at 12a, is beside the point.

standard, the Court held, "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause." *Id.*; *accord Delaware v. Prouse*, 440 U.S. 648, 656 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975). Although *Montoya de Hernandez* does not address nonroutine searches of personal property, it makes clear that the constitutional and statutory authority to conduct suspicionless searches and seizures at the border is not unlimited. *See id.*

Nor does the border search exception's foundation in national sovereignty insulate that doctrine from the Fourth Amendment's reasonableness requirement. "The border search exception is grounded in the recognized right of the sovereign to control, *subject to substantive limitations imposed by the Constitution*, who and what may enter the country." *Ramsey*, 431 U.S. at 620 (emphasis added); *see also Marsh v. United States*, 344 F.2d 317, 324 (5th Cir. 1965) ("Border searches are . . . not exempt from the constitutional test of reasonableness."). Thus, the Solicitor General's heavy emphasis on national sovereignty, *see, e.g.*, B.U.S. at 11, begs the question: regardless of the incidents of sovereignty, the issue remains whether the disassembly of a vehicle's fuel system in the absence of any suspicion whatsoever is reasonable under the Fourth Amendment.

B. The Courts of Appeals Have Properly Held that Particularly Intrusive Searches and Seizures of Personal Property, Such As the Search and Seizure Here, Are Nonroutine and Unreasonable Under the Fourth Amendment Unless Supported By Reasonable Suspicion.

By concluding that the disassembly of Respondent's vehicle's fuel system was not a routine search, *see Molina-*

Tarazon, 279 F.3d at 717, the Ninth Circuit joined at least three other Circuits that have recognized that certain particularly intrusive searches of personal property are not routine. In fact, every Circuit to address the issue holds that nonroutine searches and seizures of inanimate objects must be supported by reasonable suspicion. *See Rivas*, 157 F.3d at 367 ("drilling into Rivas' trailer was a nonroutine search"); *United States v. Robles*, 45 F.3d 1, 5 (1st Cir. 1995) (noting that "[t]he government concedes that drilling a hole in the cylinder was nonroutine," and holding "[w]e have little difficulty concluding that drilling a hole into the cylinder was not a routine search")[3]; *Carreon*, 872 F.2d at 1441-42 (finding that drilling a hole in defendant's camper shell was "justified on the 'reasonable suspicion' standard articulated in *Montoya de Hernandez*")[4]; *see also United States v. Alfonso*, 759 F.2d 728, 738 (9th Cir. 1985) ("[E]ven in the context of a border search, the search of private living quarters on a ship should require something more than naked suspicion."). Thus, the Ninth Circuit's holding that certain highly intrusive

[3] *Amici Curiae* Washington Legal Foundation and Allied Educational Foundation ("*Amici*") suggest that *Robles* is not persuasive because the government conceded that the search in that case was not routine. *Amici* at 12 n.6. Obviously, the government's concession in that case is strong evidence that the Solicitor General's absolutist position in the instant case—he seems to suggest that no search of personal property can ever be nonroutine, *see* B.U.S. at 9-10—is ill-founded. At any rate, the opinion makes clear that the First Circuit agreed that the destructive search in that case was nonroutine and that it required reasonable suspicion. *See Robles*, 45 F.3d at 5.

[4] *Amici* also misread *Carreon*, claiming "the court never specifically addressed whether 'reasonable suspicion' was required." *Amici* at 12 n.6. To the contrary, *Carreon* observed that the "'reasonable suspicion' standard" was "applicable." *See* 872 F.2d at 1441 (disagreeing with the district court's refusal to permit the prosecutor to elicit the searching inspector's experience in other seizures because that "line of inquiry . . . goes to the heart of the applicable 'reasonable suspicion' standard").

border searches and seizures of personal property require reasonable suspicion enjoys unanimous support.[5]

Even though the Fourth Amendment protects the people from "unreasonable" searches and seizures of their "persons" *and* their "effects," U.S. Const. amend. IV, the Solicitor General argues that no search or seizure of personal property can ever be nonroutine and therefore unreasonable in the absence of reasonable suspicion.

> Whatever the appropriate rule when a highly invasive search of the person occurs at the international border, a thorough search of the person's effects does not invoke a requirement of heightened suspicion before the search can be deemed reasonable. A "routine" border search thus encompasses a thorough inspection of closed containers that are within or part of a vehicle. *Such searches*, since the early years of the Nation, have required no reasonable suspicion.

B.U.S. at 9-10 (emphasis added) (citing *Montoya de Hernandez*, 473 U.S. at 537-38). Nothing in *Montoya de Hernandez* indicates that intrusions involving destruction or disassembly of personal effects were included among "such

[5] Although the Solicitor General previously cited *United States v. Nieves*, 609 F.2d 642 (2d Cir. 1979), *see* Pet. at 12, *Nieves* is not inconsistent with *Molina-Tarazon*, *Rivas*, *Robles* and *Carreon*. Rather, appellant Nieves argued only that the "search of his *person* went beyond a routine border search. . . ." 609 F.2d at 645 (emphasis added). Specifically, Nieves contended that the removal and search of his shoes was a "strip search," subject to the "reasonable suspicion standard." *Id.* at 645-46. Because Nieves did not raise the issue of the applicability of the nonroutine search doctrine to personal property, the *Nieves* Court did not consider whether the drilling of holes in Nieves' shoes was a destructive, and therefore nonroutine, search of property, as opposed to a "strip search" of his person.

searches."[6] Surely a border inspector cannot smash a vase to view its contents or employ a torch to open up a vehicle's quarter panel; there must be limits.[7]

Not only is the Solicitor General's view that personal property merits no protection at the border contrary to the decisions of four Courts of Appeals, it also cannot be reconciled with fundamental Fourth Amendment values. "'The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.'" *Boyd*, 116 U.S. at 627 (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765)). Indeed, it is beyond dispute that "the [Fourth] Amendment protects property as well as privacy." *Soldal v. Cook County*, 506 U.S. 56, 62 (1992). Allowing low-level border inspectors carte blanche to intrude on property rights, even at the border, cannot be reconciled with this fundamental Fourth Amendment interest. *See Prouse*, 440 U.S. at 653-54 ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'") (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)) (internal quotations, citation, footnotes omitted); *see also McDonald v. United States*, 335 U.S. 451, 456 (1948) ("Power is a heady thing; and history shows that the police acting on their own cannot be trusted.").

[6] The Solicitor General offers no historical evidence that destructive searches or disassemblies of conveyances were permitted at common law. *See infra* at 24-32.

[7] *Amici* concede that some searches of inanimate objects at the border may violate the Fourth Amendment. *Amici* at 16 n.8.

Thus, the Ninth Circuit properly rejected the government's argument that "the border search authority gives the government the right to dismantle a car with no reasonable suspicion whatsoever," *Molina-Tarazon*, 279 F.3d at 713, because "border searches are not exempt from the irreducible constitutional requirement of reasonableness." *Id.* at 712; *accord Ramsey*, 431 U.S. at 620-21; *Marsh*, 344 F.2d at 324.

> Were we to accept [the government's] argument, it would mean that customs agents at the border could, acting on no suspicion, order a car disassembled down to the last o-ring, and hand it back to the owner in a large box. We think not. We hold, rather, that some searches of inanimate objects can be so intrusive as to be considered nonroutine.

Id. at 713; *accord Rivas*, 157 F.3d at 367-68; *Robles*, 45 F.3d at 5; *Carreon*, 872 F.2d at 1441-42. Ultimately, then, the question is not whether *any* border searches and seizures of personal property are unreasonable under the Fourth Amendment, but rather *which* of such searches and seizures are unreasonable. The analyses of the First, Fifth, Ninth and Tenth Circuits provide the framework to answer that question.[8]

1. *Molina-Tarazon* Properly Took Into Account the Government's Interest in Policing the Border and the Court's Cases Analyzing That Interest.

The Solicitor General mischaracterizes the *Molina-Tarazon* opinion, upon which the Court of Appeals relied in

[8] It is noteworthy that the Fifth, Ninth and Tenth Circuits—the Courts of Appeals that cover the entire southwest border with Mexico—are all supportive of Respondent's position. *See Almeida-Sanchez*, 413 U.S. at 295 (White, J., dissenting) (the border courts "perhaps have a better vantage point than we here on the Potomac to judge the practicalities of border-area law enforcement and the reasonableness of official searches of vehicles to enforce the immigration statutes").

Respondent's case, when he suggests that the Ninth Circuit "erred by failing to give any weight to the government's interest in securing the border by conducting suspicionless searches of a vehicle's gas tank." B.U.S. at 28. To the contrary, the Ninth Circuit cites the Court's cases explicating the border search doctrine as well as the same statutory authority upon which the Solicitor General relies. *See Molina-Tarazon*, 279 F.3d at 712 & n.4 (citing *Montoya de Hernandez*, 473 U.S. 531; *Ramsey*, 431 U.S. 606; *Carroll*, 267 U.S. at 154; and 19 U.S.C. § 1581(a)).

Molina-Tarazon expressly considered the governmental interests at stake. Noting that the border search was authorized by the same Congress that proposed the Fourth Amendment, *Molina-Tarazon* observed that the "border search has a long history of judicial and public acceptance." 279 F.3d at 712. It also recognized that "routine searches of persons and their effects entering the country may be conducted without any suspicion whatsoever." *Id.* (citing *Montoya de Hernandez*, 473 U.S. at 537-38). The Ninth Circuit's reliance on these authorities makes clear that it was well aware of the government's strong interest in policing the border.

2. The Disassembly and Removal of Respondent's Fuel Tank was a Nonroutine Search.

The disassembly and removal of a fuel tank is a labor intensive, highly intrusive and potentially lengthy procedure that requires specialized labor, skills and tools, and the application of force upon a vital component of an automobile. In this case, it took 20 to 30 minutes for the contract mechanic to arrive after he was called. *See* Pet. App. at 7a. The actual removal of the tank required the use of two hydraulic lifts (one to elevate the car and the other to lower the tank), and the application of force and special tools to disconnect hoses and electrical connections. *Id.* Disassembly of the tank took roughly ten to fifteen minutes. *Id.*

It then took an inspector another five to ten minutes to hammer off the bondo from on top of the tank and to remove the access plate. *Id.* at 8a. In total, nearly an hour had elapsed between the time that the contract mechanic was contacted until the gas tank was opened. The record is silent as to how much time would have been required to re-connect the gas tank had no contraband been discovered. *See id.* at 13a. The need for the use of specialized labor, as well as the actual delay here and the potential for even greater delay, strongly suggest that the search was nonroutine.

While the First,[9] Fifth[10] and Tenth[11] Circuits easily concluded that the destructive searches in those cases were nonroutine and required reasonable suspicion, the Ninth Circuit employed a careful analysis of several factors in determining that a search and seizure similar to that undertaken here was not routine. *See Molina-Tarazon*, 279 F.3d at 713-17; *see also id.* at 713 n.5 ("These happen to be the factors relevant in our case. We do not rule out the possibility that other factors, such as protracted delay in completing the search, may render a search nonroutine."). The multi-factor analysis employed in *Molina-Tarazon* strongly supports the Court of Appeals' conclusion that the search here was nonroutine.

First, *Molina-Tarazon* relied on the fact that force was used to disassemble the gas tank.

> The search of Molina's truck involved the use of tools. The mechanic hoisted the truck onto a lift, loosened the straps holding the tank to the chassis, disconnected the filler and sending hoses, detached electrical connections, disengaged the fill neck and unscrewed the bolts. He then detached the tank itself by

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[9] *See Robles*, 45 F.3d at 5.

[10] *See Rivas*, 157 F.3d at 368.

[11] *See Carreon*, 872 F.2d at 1441-42.

> unscrewing the pump unit and removing the pressed in 'bushing' which held the tank to the truck. All of these actions required the use of force and in their totality they raise the inference that this was not a routine search.

279 F.3d at 714. The use of force was also critical to the reasoning of the other Circuits that have applied the non-routine search doctrine to searches of personal property. *See, e.g.*, *Rivas*, 157 F.3d at 367 (agreeing with the First Circuit's conclusion that "'drilling into a closed, metal cylinder was not a routine search because force was used to effect the search'") (quoting *Robles*, 45 F.3d at 5); *see also United States v. Braks*, 842 F.2d 509, 511-12 & nn.5-12 (1st Cir. 1988) (cataloguing factors relevant to the analysis of a nonroutine search and including "whether force is used to effect the search" as a relevant factor).

The Solicitor General rejects the inference drawn by the various Courts of Appeals, arguing that "[i]n the most basic of border searches, customs officers must often use force, such as removing packing tape from a box or prying open a crate." B.U.S. at 29. His observation is beside the point; everyone expects that a box or crate will be opened at some point: they are merely the media in which other items are shipped. But no one buys a car expecting that his or her fuel system will ever be "opened." Thus, the extensive use of force in this context, as when destructive force is applied in drilling into a vehicle or other item, is neither expected nor welcome. It is not routine.[12]

In addition to his attempt to draw an analogy between a box and a vehicle's fuel system, the Solicitor General relates

[12] By way of illustration, it is very common for two individuals who do not know each other to greet one another with a handshake, a "routine" application of force. Application of the same amount of force, to a different part of the body, would not be "routine."

that "Customs officials also advise[13] that they commonly find, only after some use of force or disassembly, contraband hidden in secret compartments in vehicular trunks, doors, seats, dashboards, floorboards, and spare tire compartments." B.U.S. at 30. The Customs officials' experiences do not in any way undercut the Ninth Circuit's analysis: *Molina-Tarazon* holds that the use of force is a relevant factor in determining whether a search is nonroutine, not that it is the only factor. *See* 279 F.3d at 713-14. The fact that some searches involving force have been successful—and Respondent knows nothing about them, including whether these extra-record seizures were supported by reasonable suspicion—simply does not speak to whether the searches were routine or reasonable under the Fourth Amendment.

Finally, the Solicitor General argues that consideration of the use of force in the analysis of whether a search is routine will have a direct effect on smugglers' strategic choices. "A rule that the use of force triggers a requirement of reasonable suspicion would encourage smugglers to conceal their contraband in vehicular compartments or containers that are not easily opened for inspection, with unacceptable adverse consequences to border security." B.U.S. at 30.

The Solicitor General's argument suffers from numerous flaws. First, the Ninth Circuit has not adopted the rule he posits: the use of force is but one factor to consider; *Molina-*

[13] The Solicitor General's reliance on communications outside the record is improper. *See Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 n.3 (1986) ("This argument, however, was not presented in the state courts, and appears to rest in large part on facts not part of the record before us. Because this Court must affirm or reverse upon the case as it appears in the record . . . , we have no occasion to consider the argument here. Nor is it appropriate, as a matter of good judicial administration, for us to consider claims that have not been the subject of factual development in earlier proceedings.") (citing *Russell v. Southard*, 53 U.S. 139, 159 (1851)) (additional citation omitted).

Tarazon does not hold that "the use of force triggers a requirement of reasonable suspicion." *See Molina-Tarazon*, 279 F.3d at 713-17. Second, there is no reason to believe that a modest reasonable suspicion requirement for the disassembly of a vehicle's fuel system will prompt changes in the way smugglers do business: they hardly need additional motivation to conceal contraband. As the Court recognized over 20 years ago in *United States v. Ross*, 456 U.S. 798 (1982), "[c]ontraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some kind of container." *Id.* at 820.[14]

Finally, if the consideration of force as a factor in the analysis of border searches actually caused "unacceptable adverse consequences to border security," the government could have offered evidence of these consequences below. The First, Fifth and Tenth Circuit's holdings in *Robles*, *Rivas*, and *Carreon*—all of which emphasize the forcible nature of the searches involved—have provided years of experience from which the government could have offered proof to back up the Solicitor General's speculations as to the effect of considering the use of force in evaluating whether a border search is "routine."[15] Despite the fact that rules emphasizing

[14] The Solicitor General cites this passage in his brief. *See* B.U.S. at 14.

[15] Both Director Ahern and Assistant Director Hinckley specifically address searches involving "necessary damaging force," Pet. App. at 13a, 16a—exactly the sort of intrusion addressed in *Robles*, *Rivas*, and *Carreon*—yet they provide no evidence supporting their claims that a reasonable suspicion requirement would result in "an increase in compartment smuggling of drugs, contraband, and other dangerous materials," Pet. App. at 13a, and that "fewer gas tank and other compartment searches" would occur. *Id.* at 16a. In his reply to Respondent's Opposition to the Petition for a Writ of Certiorari ("Pet. Reply"), the Solicitor General went outside the record to claim that "Customs authorities have advised that officers regularly conduct gas tank searches involving the disassembly of a gas tank at border locations within the First, Fifth, and Tenth Circuits, and that those searches have proceeded on the assumption that no level of suspicion is required." Pet. Reply at 6. Not only is their "assumption" contrary to the reasoning of *Robles*, *Rivas*, and *Carreon*, reliance on this extra-record information is improper. *See Witters*, 474 U.S. at 488 n.3. But even if that extra-record information is accurate, it does not change the fact that the declarations offered by Director Ahern and Assistant Director Hinckley reach the very searches that *Robles*, *Rivas*, and *Carreon* addressed—ones involving destructive force—and they still offered no evidence whatsoever to support their claims. The lack of supporting evidence for those claims suggests that all of their arguments, those regarding searches and seizures involving destructive force and those involving disassembly of fuel systems, are purely speculative.

the use of force have been in place in three other Circuits for many years, the government failed to offer any such evidence below.

The danger to the driver and passengers of the automobile, as well as the fear occasioned by the disassembly of the gas tank, are additional factors supporting the Ninth Circuit's determination that the search in *Molina-Tarazon* was nonroutine. 279 F.3d at 714-17; *accord Braks*, 842 F.2d at 512 & n.10 ("whether the type of search exposes the suspect to pain or danger" is relevant to whether a search was routine). The Ninth Circuit supported its conclusion that a gas tank disassembly raises issues of danger with its common sense observation that "[a]n error in removing, disassembling and then reassembling the portion of a motor vehicle that contains a highly flammable and potentially explosive substance like gasoline might well result in disastrous consequences for the vehicle's owner." *Id.* at 715. The danger resulting from an accident involving a vehicle's fuel system is hardly "entirely speculative," as the Solicitor General suggests. *See* B.U.S. at 30-31. The possibility that a "fuel leak [could] cause[] a fire or explosion," *Molina-*

Tarazon, 279 F.3d at 715, is a "point [that does not] require[] much documentation." *Id.* at 715 n.7.[16]

Molina-Tarazon also took into account "whether the search is psychologically intrusive." *Id.* at 715-17. Citing several of the Court's cases emphasizing the fear engendered by law enforcement intrusions, the Ninth Circuit "conclude[d] that the search conducted here would make a reasonable driver—one aware that a mechanic working for the government dismantled and reassembled a component critical to his vehicle's safe operation—apprehensive about getting back into his vehicle and continuing on his way." *Id.* at 716.

The Solicitor General dismisses such fears as "unreasonable" because they are not based on "empirical" evidence. B.U.S. at 31-32. Again, the danger associated with highly flammable gasoline can hardly be gainsaid. And not every motorist will blindly trust a mechanic that he or she did not choose, *see Molina-Tarazon*, 279 F.3d at 716, and whose work "leaves the normal driver unable to confirm whether everything is restored to its original state." *Id.* at 717.[17] Such caution is not unreasonable.

Moreover, the Solicitor General's denigration of the fear likely to be visited upon innocent drivers—and the Solicitor General admits that in fiscal year 2003 there were 348 gas tanks disassembled that contained nothing but fuel[18]—runs contrary to this Court's Fourth Amendment jurisprudence,

[16] The Solicitor General argues that trained mechanics can "readily" perform fuel system disassemblies. B.U.S. at 25 & n.5. He does not dispute, however, that the results of an error in that process may be quite serious. *Cf.* Joe Sego, Gas Tank Removal and Replacement, http://www.ifsja.org/tech/fuel/gastank.shtml (last visited Dec. 30, 2003) (gas tank removal "can be a serious hazard to you and your truck").

[17] Nearly everyone is familiar with the expression "close enough for government work."

[18] *See* B.U.S. at 31.

which takes into account the fear occasioned by law enforcement intrusions, reasonable or not. *See, e.g.*, *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975) (roving patrols were more likely to "frighten motorists"); *Prouse*, 440 U.S. at 657 (roving stops "may create substantial anxiety"). Thus, *Molina-Tarazon*'s consideration of the fear engendered by the instant intrusion as a single factor in its analysis is well supported in the Court's cases.

3. The Court of Appeals Correctly Concluded that the Search Here Was Not Routine and Was Unreasonable Because It Was Not Supported By Reasonable Suspicion.

The government, of course, bears the burden of demonstrating the applicability of an exception to the protections of the Fourth Amendment. *See United States v. Jeffers*, 342 U.S. 48, 51 (1951), *overruled on other grounds*, *Rakas v. Illinois*, 439 U.S. 128 (1978); *accord Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion). Based upon its analysis of the various factors supporting an inference that the search was not routine, the Court of Appeals correctly found that the routine border search exception did not apply, and the disassembly of the fuel system required reasonable suspicion. *See Molina-Tarazon*, 279 F.3d at 713-17.[19] The Court's cases establishing that the border search exception applies to routine searches and seizures fully support the Court of Appeals' conclusion. *See Montoya de Hernandez*, 473 U.S. at 538; *Almeida-Sanchez*, 413 U.S. at 272; *Ramsey*, 431 U.S. at 619.

[19] The government waived the right to argue reasonable suspicion below. Pet. App. at 3a. It is bound by that waiver. *See Brignoni-Ponce*, 422 U.S. at 886 n.11.

C. The Solicitor General's Historical Analysis Does Not Demonstrate That Searches Involving the Destruction or Disassembly of Property Were Considered Reasonable at the Time of the Adoption of the Fourth Amendment.

1. Introduction

"In reading the [Fourth] Amendment, [the Court is] guided by 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. . . .'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (quoting *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995)). The Solicitor General's argument relies heavily on the search authority described in some of the earliest customs statutes, particularly one passed in 1790 addressing searches of ships. B.U.S. at 20-24. Those statutes, however, do not reflect any analysis of destructive searches and seizures, nor do they address the disassembly of conveyances. In fact, the earliest statutes suggest that the first Congress limited the most intrusive searches of ships to situations where customs officials had individualized suspicion. Nor do those statutes authorize the use of force necessary to disassemble a conveyance.

The Solicitor General's theory that customs inspectors were granted broad authority to undertake searches and seizures involving damage to or disassembly of property such as ships conflicts with the historical evidence of the colonists' objections to highly intrusive searches of vessels. Moreover, he fails to address that conflict by offering any evidence that such searches and seizures were permissible under the common law.

2. The Customs Statute Passed In 1790 Does Not Suggest that Suspicionless Searches and Seizures Involving Destruction of Property and Disassembly of Conveyances Were Considered Reasonable.

The Court has frequently noted that various customs statutes authorizing warrantless intrusions of one sort or another were passed close in time to the adoption of the Fourth Amendment, and it has relied on that temporal proximity to support its constitutional analyses in those cases. *See, e.g.*, *United States v. Villamonte-Marquez*, 462 U.S. 579, 584-85 (1983); *Ramsey*, 431 U.S. at 616-18; *Carroll*, 267 U.S. at 149-51; *Boyd*, 116 U.S. at 623. Attempting to extend that authority, the Solicitor General argues that the instant intrusion must be constitutional because the authority upon which the officers rely, 19 U.S.C. § 1581(a), derived from a statute passed by the first Congress, the Act of Aug. 4, 1790 ("1790 Act"), ch. 35, § 31, 1 Stat. 145, 164. B.U.S. at 21.[20] Indeed, *Villamonte-Marquez* observed that the latter statute "appears to be the lineal ancestor" of the former. *See* 462 U.S. at 584-85.

In *Villamonte-Marquez*, the Court analyzed whether a suspicionless boarding of a vessel for a document inspection was constitutional. *See id.* at 584 n.3. The 1790 Act authorized precisely that sort of boarding. *See id.* at 584 (citing 1 Stat. at 164). As a result, the Court reasoned that "the enactment of this statute by the same Congress that promulgated the constitutional amendments that ultimately

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[20] Neither section 1581(a), nor the other vehicle search statutes, *see* 19 U.S.C. §§ 482, 1461, explicitly authorize disassembly of a vehicle. In fact, section 1461 contemplates opening a "closed vehicle" with a key. *See* 19 U.S.C. § 1461.

became the Bill of Rights gives the statute an impressive historical pedigree." *Id.* at 585.[21]

The Solicitor General's analogy breaks down, however, because while the 1790 Act clearly authorized the entry challenged in *Villamonte-Marquez*, *see* 1790 Act, § 31, 1 Stat. at 164 (authorizing officials "to go on board ships or vessels . . . for the purpose of demanding manifests . . ."), the 1790 Act did not explicitly authorize searches and seizures involving destruction of property or disassembly of it. Thus, an inference that the first Congress necessarily thought that an intrusion similar to that in the instant case was constitutional—if it can be drawn at all—is far weaker than the similar inference the Court drew in *Villamonte-Marquez*. The fact that the first Congress could not have anticipated the existence of the fuel system dismantled here further undermines the Solicitor General's argument.[22]

The Solicitor General's historical argument is also flawed because the provision he relies on does not authorize intrusive searches. Section 31 of the 1790 Act permits officials to board vessels

> for the purposes of demanding the manifests . . . , and of examining and searching the said ships or vessels; and the said officers respectively shall have free access to the cabin, and every other part of a ship or vessel: and if any box, trunk, chest, cask, or other package, shall be found

[21] *Ramsey*, 431 U.S. at 616-18; *Carroll*, 267 U.S. at 149-51; and *Boyd*, 116 U.S. at 623, considered a different statute passed by the first Congress, the Collection Act of July 31, 1789, 1 Stat. 29.

[22] The Solicitor General's inference is also weaker than that drawn in *Villamonte-Marquez* because the statute he cites relates to searches of ships, and he provides no evidence that the first Congress equated ships with other conveyances. *See* William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* 1548-49 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) ("*Cuddihy*") (finding no evidence of the Framers' view toward searches of other vehicles).

> in the cabin, steerage or forecastle of such ship or vessel, or in any other place separate from the residue of the cargo, it shall be the duty of said officer to take a particular account of every such box, trunk, cask, or package, and the marks, if any there be, and a description thereof; and if he shall judge proper to put a seal or seals on every such box, trunk, chest, cask, or package; and such account and description shall be by him forwarded to the collector of the district to which such ship or vessel is bound.

1790 Act, § 31, 1 Stat. at 164. The inspectors were also authorized to seal the hold and prevent its opening—and the unlading of the goods—until the inspectors returned. *See id.*, 1 Stat. at 165. In effect, the inspectors "created an administrative record, so that when the ship was unloaded, officials could 'compare the account and entries.'" Morgan Cloud, *Searching Through History, Searching for History*, 63 U. Chi. L. Rev. 1707, 1740 (1996) (analyzing an analogous portion of the Collection Act of 1789, § 15, 1 Stat. at 40-41). Section 31 did not, however, authorize the opening of any items; nor did it authorize the inspectors to seize anything.

Those powers were delineated in other provisions of the Act. For instance, section 47 actually permitted "the collector or other officer of the customs . . . to open and examine" such "packages," but only "in the presence of two or more reputable merchants." 1790 Act, § 47, 1 Stat. at 169-70. A second provision allowed search *and* seizure.

> [E]very collector, naval officer and surveyor . . . shall have the full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed: and therein to search for, seize and secure any goods, wares or merchandise.

Id., § 48, 1 Stat. at 170. The Court has interpreted the "reason to suspect" language to require a showing of probable cause.

See Wyoming v. Houghton, 526 U.S. 295, 300 (1999); *accord Vernonia School District 47J v. Acton*, 515 U.S. 646, 670-71 (1995) (O'Connor, J., dissenting) (citing identical language in the Collection Act of July 31, 1789, § 24, 1 Stat. at 43). Thus, it appears that the first Congress required probable cause for the most intrusive search it authorized, a higher standard than the Court of Appeals applied here.

Finally, the provision of the 1790 Act relied upon by the Solicitor General does not authorize the use of force by inspectors. *See* 1790 Act, ch. 35, § 31, 1 Stat. at 164. The various Courts of Appeals found the use of force to be an important factor in determining whether a search is routine. *See, e.g.*, *Molina-Tarazon*, 279 F.3d at 713-14. While the 1790 Act permits boarding, *see* 1790 Act, ch. 35, § 31, 1 Stat. at 164, it nowhere permits the use of force inherent in drilling into a conveyance or disassembling it. *Cf. Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (statute that authorized warrantless entry into premises in which liquor was kept did not permit agents to break a lock to allow entry without securing a warrant allowing forcible entry).[23] Because the first Congress did not authorize the use of force, its passage of the 1790 Act provides no support to the Solicitor General's argument.[24]

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[23] *Colonnade* found it significant that Congress had authorized a fine in the event that agents were refused entry. *See* 397 U.S. at 74, 77. The 1790 Act also provided for a fine in the event of resistance against inspectors. *See* 1790 Act, ch. 35, § 51, 1 Stat. at 170.

[24] The Solicitor General also cites statutory authority for searches of luggage. B.U.S. at 23-24. Respondent does not challenge the constitutionality of searches of luggage.

3. The Colonists' Attitudes Toward Extensive Customs Searches At the Time of the Framing Suggest That the First Congress Would Not Have Considered Searches Involving Destruction or Disassembly of Conveyances To Be Reasonable.

In the pre-revolutionary period, customs searches of vessels were a source of significant controversy. "In the last years before the American Revolution, Americans increasingly regarded not only houses but ships as castles." *Cuddihy* at 1215; *see also id.* at 362-63 ("Although their arguments were more visceral than intellectual, many ordinary colonists regarded not only their cabins but also their ships and even their persons as sanctuaries against the government."). The colonists' assertion of a right to security in their property, in this case ships, prompted opposition to excessively intrusive searches of vessels. *See id.* at 1217-18 ("Opinion against promiscuous searches afloat was an offshoot of deepening opposition to the same kind of searches on land by general warrant and writ of assistance."); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 Amer. Crim. L. Rev. 603, 629 (1982) ("*Grano*") ("[c]olonists protest[ed] the search [of John Hancock's sloop, the Liberty]"); Oliver M. Dickerson, *The Navigation Acts and the American Revolution* 218-19 & n.22 (1951) ("*Navigation Acts*") (colonists objected to searches involving rough treatment and breaking items by customs officers); *see* Harris J. Yale, Note, *Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception*, 11 Hofstra L. Rev. 733, 748 n.122 (1983) (protests over the search and seizure of Hancock's vessel indicate that the Fourth Amendment's "prohibition of unreasonable searches [was] intended to cover . . . vessels at sea"). In addition, "the colonists . . . loathed the customs officials." *Grano* at 619; *accord Navigation Acts* at 219.

In view of the colonists' objections to excessive searches of ships, and their hostility to customs officers, it is highly unlikely that the first Congress would have regarded suspicionless searches and seizures of conveyances involving the use of force or disassembly as "reasonable" under the Fourth Amendment.[25]

4. The Solicitor General Has Offered No Evidence That Searches and Seizures That Involved the Use of Force or Disassembly of Property Were Permissible Under the Common Law.

The Solicitor General does not discuss "'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. . . .'" *Atwater*, 532 U.S. at 326. The Court in *Boyd* quoted extensively from Lord Camden's opinion in *Entick v. Carrington*, portions of which establish the relevant common law. "'By the laws of England, every invasion of private property, be it ever so minute, is a trespass.'" *Boyd*, 116 U.S. at 627 (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029); *see also* 8 William Holdsworth, *A History of English Law* 467 (1938) (Lord Camden's analysis applied to real and personal property). As a result, one committing a trespass "'is bound to show, by way of justification, some positive law has justified or excused him.'" *Id.* (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029). Thus, in order to show that searches and seizures effected by way of use of force or disassembly of conveyances were allowed under the common law, the

[25] The Framers understood that it was important to restrain the federal government in its efforts to acquire revenues. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 30 (1937) ("Lasson"). It would be inconsistent with that understanding for the first Congress to have intended for the Act of Aug. 4, 1790—a revenue statute—to have sanctioned broad incursions on the rights protected by the Fourth Amendment.

Solicitor General would be required to demonstrate that "some positive law . . . justified" such an extreme intrusion. *See id.* He has pointed to none.

In the years immediately preceding the American Revolution, the English government considered smuggling to be a major problem in the American colonies. *See* Jacob W. Landynski, *Search and Seizure and the Supreme Court* 30 (1966). The crown's "principal enforcement weapon [in the effort to stamp out smuggling] was the writ of assistance." *Id.* Although there is disagreement as to the source of the actual search power—whether it was from the writs of assistance or the Customs officers' commissions, *see id.* at 32 n.53[26]—neither authorized the broad intrusion now sought by the Solicitor General. For instance, a typical commission issued to a Customs officer allowed entry "into any Ship, Bottom, Boat or other Vessell . . . to make diligent search into any Trunk, Chest, Pack, Case, Truss or any other parcell or package whatsoever. . . ." *Cuddihy* at 509 n.6 (quoting a Customs commission from 1685). *See also* 4 Charles M. Andrews, *The Colonial Period of American History* 164 (1938) ("*Andrews*") (discussing a similar commission). Neither the language permitting entry into a vessel, nor the right to open receptacles that contain cargo explicitly authorizes disassembly of a conveyance in order to effect a search. *Cf. Colonnade*, 397 U.S. at 77; *see also* M. H. Smith, *The Writs of Assistance Case* 118 (1978) ("It needed little more than a riffle through familiar lawbooks . . . for any lawyer worth his fee to see that a power of forcible entry was

[26] *Compare Lasson* at 54, 69 (writs of assistance were necessary to search power) *with* Oliver M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *The Era of the American Revolution* 45 (Richard B. Morris ed., 1939) ("*Writs of Assistance as a Cause*") (the writs of assistance were the method by which the customs officers sought a "court order to the constables and other officers to assist the customs officers in the exercise of their duties").

by no means to be inferred from a power of entry, and without clear statutory authority it could not lawfully exist.").

Similarly, the use of force to effectuate the search powers granted in a customs officer's commission was highly controversial. *See Andrews* at 164 (citing instructions from England in 1683 that told collectors "to do no more than 'enter into any ship, bottom, boat, or other vessel, as also into any shop, house, warehouse, hostelry, or other place whatsoever, to make diligent search into any trunk, chest, pack, case, truss, or any other parcell or packadge whatsoever, for any goods, wares, merchandizes, prohibited to be exported or imported, or whereof the customes or other dutyes have not been duely paid and the same to seize to his Majesty's use'") (quoting a 1683 commission printed in *Maryland Archives* V, at 521). Even where force was allowed, it was only permitted in the case of resistance, and the application of force was authorized only as to items that, unlike a fuel system, were expected to be opened from time to time, such as doors, luggage and shipping materials. *See Writs of Assistance as a Cause* at 45 n.6 (customs commission from 1772 gave "power . . . in case of resistance to break open any Door, Trunk, Chest, Case, Pack, Truss or any other Parcel or package . . ."). There was no authorization for the use of force or disassembly beyond those parameters.

Because the Solicitor General has not met his burden to demonstrate a "positive" justification, *see Boyd*, 116 U.S. at 627, for the sort of intrusion he seeks to justify here, he has not demonstrated that a similar intrusion would be permitted under the common law.

D. If the Court Applies a Balancing Test, Respondent's Privacy and Property Interests Outweigh the Government's Interest in Randomly Disassembling Vehicles at the Border.

The Solicitor General argues that the Court should apply a balancing test to determine whether or not suspicionless searches and seizures of a vehicle's fuel system are reasonable under the Fourth Amendment. *See* B.U.S. at 11-19. Given that the Solicitor General cannot demonstrate that searches and seizures of conveyances that involve the use of force or disassembly were legitimate at the time of the adoption of the Fourth Amendment, it is questionable whether resort to a balancing test is necessary. *See Vernonia School District*, 515 U.S. at 652-53 (the Court proceeds to a balancing analysis "[a]t least in . . . case[s] . . . where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted"). Even if a balancing test should be undertaken, the Court has already effectively performed that analysis by holding in *Montoya de Hernandez*, *Almeida-Sanchez*, and *Ramsey* that the border search exception applies only to routine searches and seizures. The Courts of Appeals have properly applied that analysis to searches and seizures of personal property. If the Court performs that balancing anew, the scales clearly tip toward vindication of travelers' Fourth Amendment interests.

In performing such a balancing test, "'the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Villamonte-Marquez*, 462 U.S. at 588 (quoting *Prouse*, 440 U.S. at 654). The intrusion on individual interests is sub-

stantial, while the Solicitor General has failed to demonstrate any significant need for the unfettered discretion he seeks.[27]

First, "[a] search, even of an automobile, is a substantial invasion of privacy." *Ortiz*, 422 U.S. at 896. Although the Solicitor General asserts that the privacy interest at stake in the instant search is "minimal," B.U.S. at 25-26, the Court, referring to the facts in *Carroll*, has recognized that "[a]n individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened." *Ross*, 456 U.S. at 823. The Court's observation in *Ross* is no less applicable here.

Moreover, the individual's Fourth Amendment interests in this case are not limited to his or her privacy concerns. The removal of a gas tank is not only a search, but also a seizure of property. "A 'seizure' of property . . . occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" *Soldal*, 506 U.S. at 61 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The "[Fourth] Amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal.'" *Robbins v. California*, 453 U.S. 420, 426 (1981), *overruled on other grounds*, *Ross*, 456 U.S. 798. Although the Solicitor General, apparently disagreeing with *Ross*, denigrates the privacy interests implicated by the disassembly of Respondent's fuel system, B.U.S. at 25, "the [Fourth] Amendment protects property as well as privacy."

[27] In fiscal year 2003, 348 empty gas tanks were disassembled. B.U.S. at 31. Requiring reasonable suspicion will allow many legitimate travelers to avoid unwarranted intrusions. *See Vernonia School District*, 515 U.S. at 667 (O'Connor, J., dissenting) ("Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.").

Soldal, 506 U.S. at 62; *see also Boyd*, 116 U.S. at 630 (the Fourth Amendment protects the "indefeasible right of personal security, personal liberty, and private property"). In fact, "seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." *Id.* at 68.

These property rights, like privacy interests, play a role in the Court's balancing test. Thus, in *Jacobsen*, the Court stated that "[t]o assess the reasonableness of this conduct, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" 466 U.S. at 125 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)); *accord Soldal*, 506 U.S. at 71. Respondent's property interests weigh heavily in his favor: his right to be "secure" from "unreasonable searches and seizures" of his "effects," U.S. Const. amend. IV, should provide protection against disassembly of valuable property in which he reposes his trust by unknown government functionaries whom he has neither selected nor approved. Indeed, those interests provide additional support to *Molina-Tarazon*'s emphasis on the security interests implicated by the danger and the fear resulting from intrusions like those undertaken as to Respondent's vehicle. *See* 279 F.3d at 714-17.

While Respondent's Fourth Amendment interests are substantial, the Solicitor General offers little evidence to support his claim that vindication of the government's interest in border security requires that low-level border inspectors be vested with absolute discretion to disassemble vehicles even in the absence of any basis for their suspicions. As an initial matter, the Solicitor General does not dispute Respondent's argument "that the government has not demonstrated that customs or immigration inspectors regularly conduct suspicionless gas tank searches." B.U.S. at 19. The failure to offer such evidence below belies the Solicitor General's claim that

such searches "are an essential tool to protect against the smuggling of drugs, persons, weapons, and other contraband." *See id.* at 16.

In the absence of any evidence of a policy under which border inspectors employ their "essential tool" at the border, the Solicitor General argues that "[a] requirement of reasonable suspicion would remove the significant deterrent effect of suspicionless searches and could actually encourage criminals to use gas tanks as a means of smuggling contraband." B.U.S. at 17; *see also id.* at 19 (emphasizing deterrence). Indeed, both Director Ahern and Assistant Director Hinckley speculate that the Ninth Circuit's decision in *Molina-Tarazon* will lead to an increase in the use of gas tanks in smuggling efforts and a decrease in the effectiveness of the efforts of Customs and Immigration inspectors to combat these activities. Pet. App. at 13a, 16a-17a.[28]

The Solicitor General's assertions are not supported by any evidence, statistical or otherwise. This shortcoming is significant because of the decisions in *Rivas* and *Carreon*. In *Rivas*, a border inspector drilled into Rivas' camper, an item of personal property. The Fifth Circuit held that the search was nonroutine and that the Fourth Amendment required a showing of reasonable suspicion. *See* 157 F.3d at 367; *accord Robles*, 45 F.3d at 5. Thus, for over 5 years it has been the law of the Fifth Circuit—which contains some of the nation's busiest ports of entry—that reasonable suspicion must be established to support certain searches of personal property. Yet the government offered no evidence regarding

[28] *Amici* sound an alarmist note, insisting—without explanation—that vindicating Respondent's Fourth Amendment interests will somehow deprive the government of the authority to undertake suspicionless searches of cargo. *Amici* at 17. Respondent's analysis of the interests implicated in the disassembly of his vehicle's fuel system bear no relationship to the issues raised by cargo searches.

the effect of *Rivas* on the operations of Customs and Immigration inspectors in the Fifth Circuit.

The Tenth Circuit, which also contains a border state, interpreted *Montoya de Hernandez* to "require[]" a "particularized and objective basis" for a finding of "reasonable suspicion" to justify a nonroutine search in which an inspector drilled into a camper wall. *Carreon*, 872 F.2d at 1443. *Carreon* was decided 15 years ago. Yet the government offered no evidence regarding the effect of the *Carreon* decision on the operations of Customs and Immigration inspectors in the Tenth Circuit.

The Solicitor General's attempt to go outside the record[29] and assert that "Customs authorities have advised that officers . . . [working] within the First, Fifth, and Tenth Circuits . . . [conduct] searches [involving fuel system disassembly] on the assumption that no level of suspicion is required," Pet. Reply at 6, does not undercut this analysis. At most, the Solicitor General's extra-record information is an attempt to mitigate the government's failure to offer evidence of an increase in gas tank smuggling in the First, Fifth and Tenth Circuits based on the application of a reasonable suspicion requirement.[30] What he overlooks, however, is his basic premise: he argues that smugglers are so sensitive to reasonable suspicion requirements that they change their behaviors to take advantage of them. B.U.S. at 17-18. If that is so, and if his extra-record information is correct, then in the First, Fifth and Tenth Circuits, we should expect that nonfactory compartment smuggling, i.e., smuggling in compartments created by the smugglers, would increase because reasonable suspicion would be required to drill into or

[29] *See Witters*, 474 U.S. at 488 n.3 ("this Court must affirm or reverse upon the case as it appears in the record").

[30] In addition, Customs' "assumption" is contrary to the reasoning of *Rivas, Robles* and *Carreon*.

forcibly disassemble them, while gas tank smuggling, as to which "Customs advised [searches are done] on the assumption that no level of suspicion is required," *Reply* at 6, would decrease. But the government offered no such evidence below. Thus, regardless of whether Customs' communications with the Solicitor General are properly before the Court and are accurate, the government still failed to offer evidence rather than speculation in the district court.

In short, if smugglers were actually hyper-sensitive to Fourth Amendment decisions, and if the government's ability to protect the border actually was significantly impaired by the recognition that the nonroutine search doctrine also applied to searches of personal property, then the government would have offered such evidence below. Its failure to do so suggests that the speculation offered in the declarations of Director Ahern and Assistant Director Hinckley is just that—speculation. No evidence supports the Solicitor General's argument that the government has a substantial interest in conducting suspicionless disassemblies of fuel systems. *See Prouse*, 440 U.S. at 659-60 (questioning state government's claim that suspicionless stops of vehicles to check registration and license would provide greater deterrence than stops based on suspicion of traffic violations).

Similarly, there is no evidence before the Court that the disassembly and removal of a gas tank is the only practicable means of determining whether the tank contains contraband. The Solicitor General goes no further than to say that the "process [of removing the gas tank] *may* be the only practicable alternative for the government to determine whether the gas tank has been modified or altered." B.U.S. at 16 (citing *Molina-Tarazon*, 279 F.3d at 712 & nn. 2-3) (emphasis added). The declarations simply do not speak to

which alternatives are practicable.[31] Indeed, they do not establish that a gas tank disassembly is *ever* the only practicable alternative.[32]

Not only do the declarations fail to support the Solicitor General's position, a comparison to the checkpoints analyzed in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), demonstrates that he has failed to justify his claim that it is essential that border inspectors not be required to demonstrate any basis for disassembling vehicles. In *Martinez-Fuerte*, the Court noted that

> [a] requirement that stops on major [highway] routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.

Id. at 557. Because a reasonable suspicion requirement would preclude "particularized study," imposition of "such a requirement would largely eliminate any deterrent to well-disguised smuggling operations." *Id.*

Vindication of travelers' Fourth Amendment rights by requiring reasonable suspicion would have absolutely no effect on border inspectors' ability to undertake the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens or contraband.

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[31] Customs, however, maintains that its non-intrusive search methods are very effective and allow it to avoid dismantling property. *See generally Customs' Annual Report* at 32, 34.

[32] The Solicitor General warns that liability concerns may deter border inspectors if the Court holds that the instant intrusion must be supported by reasonable suspicion. B.U.S. at 17. Again, the government offered no evidence of such deterrence in the Circuits that have already required reasonable suspicion in the proceedings below. Nor can he argue that the reasonable suspicion standard is unfamiliar or difficult to apply. *See Atwater*, 532 U.S. at 366 (O'Connor, J., dissenting).

Sustaining Respondent's claim would leave border inspectors free to question border crossers,[33] observe their behavior,[34] tap on gas tanks and suspected compartments,[35] and make observations of the vehicle,[36] including those aided by devices such as an "auto-creeper."[37] They will be free to employ narcotics detector dogs,[38] "density busters,"[39] fiber optic scopes,[40] x-ray machines[41] and the like. All of these

[33] *See, e.g., United States v. Bravo*, 295 F.3d 1002, 1004, 1008 (9th Cir. 2002) (inspector suspicious because defendant was "'overly-friendly'").

[34] *See, e.g., Carreon*, 872 F.2d at 1437, 1442 (inspector had reasonable suspicion to conduct a nonroutine border search where the defendant was nervous and looked away when he was spoken to, and his hand shook).

[35] *See, e.g., Bravo*, 295 F.3d at 1004, 1008 (finding inspector had reasonable suspicion as to a tool box because it sounded solid and had a space discrepancy in the bottom of it).

[36] *See, e.g., Molina-Tarazon*, 279 F.3d at 717-18 (finding reasonable suspicion based on unusual mud pattern and the presence of "freshly replaced gas hoses"); *Carreon*, 872 F.2d at 1437 (inspector observed shiny bolts on camper in which compartment found, and the shell was very thick and sounded solid).

[37] *See Molina-Tarazon*, 279 F.3d at 712 n.1 ("An autocreeper is a mirror attached to the end of a long pole with which one can view the undercarriage of a vehicle.").

[38] *See, e.g., Rivas*, 157 F.3d at 368 ("a drug-dog's alert is sufficient to create probable cause for a search").

[39] "[A] 'Buster' [is] a device that measures [the] density [of an object]." U.S. Customs Service Press Release, *U.S. Customs Operation Hard Line Officers Make First Significant Narcotics Interdiction at New Calexico Cargo Facility* (Jan. 27, 1997), http//www.cbp.gov/hot-new/pressrel/1997/0127-00.htm (last visited Dec. 2, 2003). The cited press release reflects that "[c]argo enforcement team members checked the truck with a 'Buster,' . . . and got abnormal readings from the saddle tanks of the tractor. Careful examination of the gas tanks revealed specially-built compartments inside of them, and the compartments were found to contain 219 packages of marijuana." *Id.*

[40] *See Molina-Tarazon*, 279 F.3d at 712 n.2 ("a fiberoptic scope is similar to a telescope with six feet of light-carrying cable that the operator can feed into the fill neck"); *see also* U.S. Customs Service Press Release, *U.S. Customs Inspectors Seize 4.7 Million In Cocaine In Gas Tank, One Arrested* (March 26, 1999), http//www.cbp.gov/hot-new/pressrel/1999/0326-01.htm (last visited Dec. 29, 2003) (105 pounds of cocaine found through use of "a super fiber optic scope" in vehicle's gas tank).

methods may be employed randomly to provide the deterrence the Solicitor General desires; none of them would in any way be circumscribed by affirming the Court of Appeals.[42] Because these various methods are available to permit inspectors to develop cause to justify disassembly of a fuel system in the appropriate case, the concerns that animated *Martinez-Fuerte*'s decision to dispense with individualized suspicion are absent. *See Martinez-Fuerte*, 428 U.S. at 557; *cf. Vernonia School District*, 515 U.S. at 679 (O'Connor, J., dissenting) (individualized suspicion "may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual").

The array of methods available to border inspectors demonstrates that the governmental interest in conducting suspicionless intrusions is far less compelling than that in *Montoya de Hernandez*. There, the Court noted that the alimentary canal smuggling at issue in that case "appears to be exceedingly difficult to detect." *Montoya de Hernandez*, 473 U.S. at 538-39. Recognition of a reasonable suspicion standard as a precondition of the detention in that case was burdensome for the government because "this type of

[41] *See United States v. Vargas-Castillo*, 329 F.3d 715, 717, 722-23 (9th Cir. 2003) (customs official drove suspected vehicle into an "X-ray station" at the port of entry).

[42] For reasons that they do not divulge, *Amici* think that sustaining Respondent's claim may limit the use of X-rays on vehicles at the border. *Amici* at 17. They are wrong. *See United States v. Okafor*, 285 F.3d 842, 846 (9th Cir. 2002) ("We hold that examination of luggage and other containers by x-ray or other technological means may be done at the border with no required showing of particularized suspicion. . . .").

smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search. . . ." *Id.* at 541. If "inspectors will rarely possess probable cause," it is also true that the development of reasonable suspicion will be difficult.

Here, the barriers to developing reasonable suspicion are far less substantial than those encountered by officials seeking to detect alimentary canal smuggling. *See Brignoni-Ponce*, 422 U.S. at 883 ("the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators"); *accord Prouse*, 440 U.S. at 656. The government's interest in the authority to conduct suspicionless intrusions is correspondingly lower than the interest it asserted in *Montoya de Hernandez*. In fact, in those very few cases where the government has failed to meet the reasonable suspicion standard, it either litigated the issue incompetently, *see Rivas*, 157 F.3d at 368 (the government failed to call the dog handler or any expert to explain the dog's ambiguous reaction to the vehicle), or simply chose not to try. *See* Pet. App. at 3a (the district court found that "the Government has waived its right to rely on . . . reasonable suspicion [because] the Government has declined to establish [it]"). A reasonable suspicion requirement will place reasonable limits on the discretion of low-level officials to effect nonroutine searches and seizures at very little cost.

Finally, the Solicitor General cites the apprehension of a would-be terrorist who planned to detonate explosives at LAX airport as a basis for taking a narrow view of the Fourth Amendment rights of citizens entering this country. B.U.S. at 18 (citing *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002)). *Ressam*, of course, has no application to the instant controversy: it involved a search of a trunk. *See Ressam*, 221 F. Supp. 2d at 1254. While it is true that terrorist activity represents a grave threat to the Nation, no evidence offered below supports the view that the Ninth

Circuit's decisions in *Molina-Tarazon* and the instant case, or the decisions in *Rivas*, *Robles* and *Carreon*, in any way circumscribe the Nation's ability to defend itself. Indeed, the declarations filed below do not even make this claim.

In short, the Solicitor General has not demonstrated that vindication of travelers' Fourth Amendment rights will make the Nation vulnerable. Rather, the impressive array of techniques and equipment available to border inspectors suggests quite the opposite. Even though risk can never be eliminated, the Court has recognized that "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez*, 413 U.S. at 273. The interests advanced by the Solicitor General do not justify the intrusion into Respondent's Fourth Amendment rights.

E. Every Circuit Court that has Considered the Issue has Held that a Nonroutine Border Search Must be Supported by Reasonable Suspicion; the Suggestion That Only Some Nonroutine Searches Need Be Supported By Reasonable Suspicion Should Be Rejected.

The Solicitor General and *Amici* suggest that some nonroutine searches constitute only "minimal intrusions" and need not be supported by reasonable suspicion. *See* B.U.S. at 10; *Amici* at 9-13. Although the Solicitor General devotes only a single paragraph to this notion, *Amici* explain that they advocate for an ad hoc test in which no one will know whether reasonable suspicion in support of a particular intrusion is required until a court rules on it. *See Amici* at 13. Because exceptions to the protections of the Fourth Amendment are "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958), and the border

search exception applies to routine searches, *Montoya de Hernandez*, 473 U.S. at 538, there is no basis for dispensing with the requirement of individualized suspicion when a search is nonroutine.

Morever, the Court's recognition that the reasonable suspicion standard "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause," *id.* at 541, suggests that the reasonable suspicion standard is proper under these circumstances. As discussed above, a reasonable suspicion requirement will also appropriately balance private and governmental interests by protecting privacy and property rights while placing only a minimal burden on the government in light of its substantial ability to develop facts supporting reasonable suspicion. *See supra* at 33-43.

Amici cite no case adopting their view. In fact, every Circuit court that has considered this issue has followed *Montoya de Hernandez* and held that if the search is nonroutine, then the applicable standard is reasonable suspicion. *Molina-Tarazon*, 279 F.3d at 717; *Rivas*, 157 F.3d at 367; *Robles*, 45 F.3d at 5; *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir. 1994); *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993); *Carreon*, 872 F.2d at 1440-42; *United States v. Oyekan*, 786 F.2d 832, 837 (8th Cir. 1986)[43]; *see also United States v. Boumelhem*, 339 F.3d 414, 420 n.3 (6th Cir. 2003). Reaffirming that nonroutine searches must

[43] *Amici* claim that the *Oyekan* does not support Respondent's position. *See Amici* at 12-13. The Eighth Circuit applied the reasonable suspicion standard to certain searches of travelers without addressing intrusions on property. *See Oyekan*, 786 F.2d at 837 ("join[ing] those circuits holding that a reasonable suspicion that a person is carrying drugs on the outside of his body may insulate a strip search from fourth amendment challenge").

be supported by reasonable suspicion will impose no significant burden on the government and will maintain a workable rule.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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